

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of:

David J. Feyen
Dave's Skelly
N7816 Highway 149
Fond du Lac, Wisconsin 54935

PECFA Claim: 54935-9507-80
Hearing: #96-307

Final Decision

Preliminary Recitals

Pursuant to a Petition for Hearing filed December 23, 1996, under § 101.02 (6) (e) Wis. Stats., and § Comm/ILHR 47.53 Wis. Adm. Code, to review a decision by the Wisconsin Department of Commerce (Department), a hearing was commenced on February 24, 1999, at Madison, Wisconsin. A Proposed Hearing Officer Decision was issued on October 12, 1999, and the parties were provided a period of twenty (20) days to file objections.

The Issue for determination is:

Whether the Department correctly denied reimbursement under the PECFA program of costs totaling \$12,927.32.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

David J. Feyen
Dave's Skelly
N7816 Highway 149
Fond du Lac, Wisconsin 54935
By: James P. Burnett, Esq.
Lutz, Bumett, McDermott, Jahn & King, LLP
50 East Main Street
Post Office Box 146
Chilton, Wisconsin 53014

Wisconsin Department of Commerce
PECFA Bureau
201 W. Washington Avenue
P.O. Box 7838
Madison, Wisconsin 53707-7838
By: Kelly Cochrane, Esq.
Assistant Legal Counsel

Wisconsin Department of Commerce
201 W. Washington Avenue, Room 322A
P.O. Box 7838
Madison, Wisconsin 53707-7838

The authority to issue a Final Decision in this matter has been delegated to the undersigned by the Secretary of the Department pursuant to § 560.02 (3) Wis. Stats.

The matter now being ready for Final Decision I hereby issue the following:

FINDINGS OF FACT

The Findings of Fact in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of this Final Decision.

CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of Final Decision.

DISCUSSION

The Discussion in the Proposed Hearing Officer Decision cited above is hereby adopted for purposes of Final Decision.

FINAL DECISION

The Proposed Hearing Officer Decision cited above is hereby adopted as the Final Decision of the Department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under § 227.48 Wis. Stats. If you believe this decision is based on a mistake in the facts or law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Office of Legal Counsel, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this Final Decision as "PARTIES IN INTEREST".

Your request must explain what mistake you believe the hearing examiner made and why it is important of you must describe your new evidence and tell why you did not have it available at the hearing in this matter. If you do not explain how your request for a new hearing is based on either a mistake of fact or

law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request for a new hearing will be denied.

Your request for a new hearing must be received by the Department's Office of Legal Counsel no later than twenty (20) days after the mailing date of this Final Decision as indicated below. Late requests cannot be reviewed or granted. The process for asking for a new hearing is set out in § 227.49 Wis. Stats.

Petition For Judicial Review

Petitions for judicial review must be filed not more than thirty (30) days after the mailing of this Final Decision as indicated below (or thirty (30) days after the denial of a request for a rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Office of the Secretary, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" or each party's attorney of record. The process for judicial review is described in § 227.53 Wis. Stats.

Dated: 4/24/00

Martha Kerner
Executive Assistant
Wisconsin Department of Commerce
201 West Washington Avenue
P.O. Box 7970
Madison, Wisconsin 53707-7970

Copies to:

Above identified "PARTIES IN INTEREST", or their legal counsel if represented.

Joyce Howe, Office Manager
Unemployment Insurance Hearing Office
1801 Aberg Avenue, Suite A
Madison, Wisconsin 53707-7975

Date Mailed: April 25th, 2000

Mailed By: Hank Patterson

STATE OF WISCONSIN DEPARTMENT OF COMMERCE

In the Matter of the PECFA Appeal of

David J. Feyen
Daves Skelly
N7816 Highway 149
Fond du Lac WI 54935

PECFA Claim # 54935-9507-80
Hearing #96-307

DELEGATION ORDER -- PECFA APPEAL

I, Brenda J. Blanchard, Secretary of the Department of Commerce, pursuant to §227.46(3)(a), Stats., do hereby delegate to the administrative law judge assigned to the above captioned appeal the authority to issue a final decision if a contested case hearing is not held because of withdrawal, default, settlement, untimeliness of the appeal, mootness of the appeal, lack of subject matter jurisdiction, or lack of standing to appeal. Pursuant to §227.46(3)(c), Stats., if a decision addressing the merits of the appeal is required or it is decided on any basis not delegated to the administrative law judge as described above, it shall be issued by the administrative law judge pursuant to the procedures in §227.46(2) as a proposed decision, and the Executive Assistant of the Department, Martha Kerner, shall make the final decision for the department.

Dated: February 9, 2000

Brenda Blanchard
Secretary
Department of Commerce

Copies to:
James P. Burnett
Lutz, Burnett, McDermott, Jahn & King
PO Box 146
Chilton WI 53014-0146

Kelly Cochrane, Assistant Legal Counsel
Office of the Secretary
Department of Commerce
P O Box 7838
Madison WI 53707-7838

**STATE OF WISCONSIN
DEPARTMENT OF COMMERCE**

**IN THE MATTER OF: The claim for
reimbursement under the PECFA
Program by**

David J Feyen
Dave's Skelly
N7816 Highway 149
Fond du Lac, WI 54935

MADISON HEARING OFFICE
1801 Aberg Ave., Suite A
P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608) 242-4818
Fax: (608)242-4813

**Hearing Number: 96-307
Re: PECFA Claim # 54935-9507-80**

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Terry W. Grosenheider, Executive Assistant of the Department of Commerce, who is the individual designated to make the FINAL decision of the department in this matter.

STATE HEARING OFFICER:
James H. Moe

DATED AND MAILED:
October 12, 1999

MAILED TO:

Appellant Agent or Attorney

James P. Burnett
P.O. Box 146
Chilton, WI S2014-0146

Department of Commerce

Kelly Cochrane
Assistant Legal Counsel
P.O. Box 7838
Madison, WI 53707-7838

**STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT**

In the Matter of the claim for Reimbursement under the PECFA Program by

David J. Feyen
Dave's Skelly
N7816 Highway 149
Fond du Lac, WI 54935

Hearing No. 96-307
PECFA Claim No. 54935-9507-80

PROPOSED DECISION

On December 6, 1996, the Wisconsin Department of Commerce (department) issued a decision denying the request by David J. Feyen (appellant) for reimbursement of costs totaling \$16,046.07 under the PECFA program.¹ The majority of the non-eligible costs, \$11,846.30, arose from services provided to the appellant by T. J. Mueller & Associates. Of the remaining non-eligible costs, \$945.28 related to interest accrued on non-eligible costs and \$135.74 related to miscellaneous other items. The appellant filed a timely request for hearing.

The Secretary of the department delegated administrative law judge James H. Moe, of the Wisconsin Department of Workforce Development (previously the Department of Industry, Labor and Human Relations), to act as state hearing officer.

Pursuant to an agreement of the parties at a telephone preheating conference, the hearing on the appeal was set for February 24, 1999, at Madison, Wisconsin. The hearing was held as scheduled, with attorney Kelly Cochrane representing the department and attorney James P. Burnett representing the appellant. Following the hearing, briefs were received from each party. The matter is now ready for the issuance of a proposed decision.

Based on the testimony taken at the February hearing, the exhibits received into evidence at that hearing, and the subsequent briefs of the parties, the state hearing officer makes the following

¹ At the hearing, the department conceded that "tank pull" costs listed on a January 31, 1991 M. L. Fuhrman invoice and a December 31, 1990, Mand Trenching invoice, together totaling \$3,118.75, were eligible for reimbursement.

PROPOSED FINDINGS OF FACT

At all times material, David J. Feyen, doing business as Dave's Skelly, was the legal owner and operator of the premises located at Hwys 149 and 151 in Peebles, Wisconsin. The site contained petroleum contamination and remediation procedures were implemented. The appellant hired T. J. Mueller & Associates to assist in managing the remediation project, which included obtaining and monitoring bank financing, obtaining and monitoring bids, and monitoring the project for PECFA eligibility because he did not have experience in those areas.

The department denied reimbursement of costs totaling \$11,846.30 invoiced by T. J. Mueller & Associates on the basis that such costs were ineligible project administration, and a duplication of services which the owner should have undertaken.

The department denied costs of \$3.32, \$6.58 and \$9.84 invoiced by Environmental Compliance Consultants, Inc. (ECCI) on the basis that such costs constituted mileage overcharges, were not properly identified, and were for general office operations such as photocopying, respectively. Costs of \$116 invoiced by En Chem were denied on the basis that they were for volatile organic compound (VOC) testing.

ISSUE

The issue presented is whether the Department correctly denied reimbursement under the PECFA program of costs totaling \$12,927.32.

RELEVANT STATUTES

Wis. Stat. § 101.143(4)(c) provides as follows:

(4) AWARDS FOR PETROLEUM PRODUCT. INVESTIGATION, REMEDIAL ACTION PLANNING AND REMEDIAL ACTION ACTIVITIES.

(c) Exclusions from eligible costs. Eligible costs for an award under par. (a) do not include the following:

3. Other costs that the department determines to be associated with, but not integral to, the eligible costs incurred because of a petroleum products discharge from a petroleum products storage system or home oil tank system.
4. Costs, other than costs for compensating 3d parties for bodily injury and property damage which the department determines to be unreasonable or unnecessary to carry out the remedial action activities as specified in the remedial action plan.

PROPOSED DISCUSSION AND CONCLUSIONS OF LAW

The appellant argued that the denied costs invoiced by T. J. Mueller & Associates are reimbursable based on a February 16, 1993 memorandum issued by a PECFA supervisor to staff addressing the eligibility of remedial oversight costs by firms such as T. J. Mueller & Associates. That memorandum stated that services such as doing bid specs, bid evaluation, bid acceptance, claim preparation (\$500 maximum), and remedial financial arrangements that are site-specific would be eligible for reimbursement under the program, but that remediation management costs, such as oversight of consultants and contractors, would not be reimbursable.

The department argued that such costs were properly denied on the basis that T. J. Mueller & Associates was not a registered consultant; the costs incurred were the responsibility of the owner; the costs were unreasonable, unnecessary, excessive and not integral to the cleanup; and the costs were associated with monitoring the consultant's performance of the remediation.

The burden is upon the appellant to demonstrate that the costs are eligible for reimbursement.

The appellant argued that the above costs should be eligible for reimbursement because other claims involving similar costs invoiced by T. J. Mueller & Associates were not disallowed by other PECFA program reviewers. However, that argument is not persuasive. The other claim materials are only of a summary nature and do not provide sufficient detail to determine why those decisions were made. Moreover, the other claims in question have little value as precedent since they have not been subjected to the formal hearing and decision-making process. It is the burden of the appellant here, once the claim has been disallowed in whole or in part, to prove the department erred in its disallowance. Whether other claims, which might have been appropriately disallowed, have in fact been paid, is not the question before this decision-maker.

The memorandum that the appellant relies upon represents only one opinion as to the eligibility of the listed costs. As such, it cannot void the statutes enacted by the legislature or the departmental rules adopted pursuant to the formal rule-making process.

Whatever the merits of the appellant's equity argument might be, the state hearing officer can only apply the law as enacted by the legislature and as interpreted by the formally adopted rules of the department. Those sources of law have not delegated any equitable power to the state hearing officer. Accordingly, the appellant's equity argument can only be addressed in another forum.

Without regard to the other accepted claims or to the equity argument, the appellant must then establish, in this forum, that the costs are reimbursable under the statutes and administrative code.

T. J. Mueller & Associates summarized its invoiced costs as follows: \$2905.39 to secure financial arrangements; \$5,107.60 to provide commodity bidding; \$503.35 in claim preparation; \$3,382.31 for project management, invoice review and payment authorization; and \$736.40 providing representative consultation, proposals and contracting.

I. FINANCING ARRANGEMENTS

The claim contained costs incurred related to financing arrangements. T. J. Mueller & Associates arranged for securing the initial bank loan at the site. It also assisted the owner in preparing the loan application documents required by the bank, as well as projected cash flow and loan requirements. T. J. Mueller also assisted in arranging refinancing following the remedial investigation stage of the project.

Wis. Admin. Code § ILHR 47.305 addresses costs associated with loans and generally provides that reasonable *interest* expense will be reimbursed. Nothing in the statutes or the administrative code provides that costs incurred to *secure or arrange* financing are eligible for reimbursement. Although the department's program reviewer testified that such costs might be reimbursed when there has been a demonstrated benefit to the program, such as negotiating a lower loan interest rate, no such showing was made here. Accordingly, T. J. Mueller & Associates invoiced costs related to arranging financing are not PECFA eligible.

II. CLAIM PREPARATION

Wis. Admin. Code § ILHR 47.30(1)(f)l provides that costs associated with the preparation of a claim package are eligible for reimbursement up to a \$500 maximum. Claim preparation costs exceeding that cap were submitted in connection with this claim. The department reimbursed those costs up to the maximum allowed by law and properly disallowed the remainder.

III. RFP CONSULTANT PROPOSAL AND CONTRACTING

Also submitted for reimbursement were costs invoiced by T. J. Mueller & Associates for assisting the owner in obtaining three proposals from consulting firms. T. J. Mueller & Associates made suggestions to the owner for including environmental consulting firms on his requests for proposals based on criteria established by T. J. Mueller & Associates. After the owner selected a consulting firm, T. J. Mueller & Associates requested that the contract be sent to it for review and an opportunity to suggest revisions, if necessary. The contract was then forwarded to the owner for review prior to signing.

The appellant argues that the owner had never acted as a contractor or person responsible for oversight of a construction project and retained T. J. Mueller & Associates for those purposes. Wis. Admin. Code § ILHR 47.33(1)(a)l clearly placed the responsibility for selection of a consultant on the owner or operator. Moreover, Wis. Admin. Code § ILHR 47.30(2)(g)3 specifically provides that costs associated with project administration such as consultant selection are not eligible for reimbursement. While the owner, given his stated lack of

experience, might have acted wisely in choosing an agent to assist him with selecting a consultant, such costs are not eligible for reimbursement.

IV. PROJECT MANAGEMENT, INVOICE AUTHORIZATION & PAYMENT

V. REPRESENTATIVE CONSULTATION, PROPOSALS AND CONTRACTING

The claim also contained costs invoiced by T. J. Mueller & Associates for project administration, invoice review, and payment authorization within bid specifications, bid evaluation and bid acceptance. Other costs invoiced by T. J. Mueller & Associates were for work providing representative consultation, proposals and contracting.

As expenses were incurred, T. J. Mueller & Associates reviewed each invoice prior to payment. It revised invoices for format and content and sought additional information needed, especially on subcontractor's invoices. Once T. J. Mueller & Associates approved payment, an Invoice Authorization Form (IAF) was prepared with T. J. Mueller & Associates' signature. The IAF was then forwarded to the owner for review and signature.

As part of its invoice approval procedure, T. J. Mueller & Associates reviewed with the consulting firm the status of the project-to-date. If project invoices were in excess of the original proposal, it discussed that with the consultant to determine the reason and requested that a change order be issued, when necessary. At other times, it requested additional documentation from the consulting firm to support certain expenses incurred.

T. J. Mueller & Associates generally prepared the administrative portions of the Requests for Bids (RFB) for commodity services in connection with the consulting firms, which generally prepared the technical and engineering specifications.

The appellant argues that had T. J. Mueller & Associates not done this work, ECCI would have had an individual doing it and would have billed for those services. While that might have been the case, that does not establish that those costs were PECFA eligible, regardless of who performed the services.

Wis. Admin. Code § ILHR 47.30(2)(g)3 provides that costs incurred by a responsible party associated with bid requirements or project administration, such as monitoring or supervising subcontractors or consultants are not eligible for reimbursement. The services of T. J. Mueller & Associates, as described above, fall within that category of excluded costs.

At the hearing, the department raised the issue of the applicability of Wis. Admin. Code §ILHR 47.40. That section provides after its general statement that consultants who are not registered will not have their services and activities reimbursed under the scope of the PECFA program, "unless the Department determines that denying reimbursement would conflict with the achievement of the goals of the PECFA program." The appellant in its brief conceded that T. J. Mueller & Associates has not registered as a consultant, but argued that since it does not provide the actual professional technical work such as was provided by ECCI and therefore has not been required to register as a consultant. However, the hearing record contains evidence that T. J.

Mueller & Associates provided technical assistance to ECCI in the performance of its duties. For example, the ECCI consultant worked with an engineer from T. J. Mueller & Associates to find the most cost-effective biopile facility. Also, T. J. Mueller & Associates developed the remediation bid package that contained an engineering bid specification. Accordingly, some T. J. Mueller & Associate's costs might additionally be denied reimbursement on the basis that a non-registered consultant performed those services.

The above-referenced statutory and administrative code language provides the department with considerable discretion to pass its judgment on whether the submitted costs were reasonable and necessary. With respect to the invoiced costs of T. J. Mueller & Associates, the appellant failed to demonstrate that the department's denial of such costs was unreasonable.

The appellant additionally asserted that the costs (En Chem Invoice #8988) associated with the VOC testing done during remediation were reimbursable because the Wisconsin Department of Natural Resources required VOC testing for site closure. In its brief, the appellant explained that soil samples were collected for VOC testing at the time of the soil remediation in order to avoid additional sampling charges on the project when the request for site closure was made, thereby saving the program money. However, Wis. Admin. Code § ILHR 47.30(2)(c)3 provides that the "[c]osts associated with full VOC testing after the investigation phase [are ineligible for reimbursement], unless required by the DNR for monitoring PECFA eligible products and the DNR letter documenting the requirement is submitted with the claim." No such letter was produced at the hearing to establish that necessary condition for eligibility. Accordingly, reimbursement of such costs was properly denied.

Finally, no evidence was presented to establish that the remaining costs totaling \$19.74 (ECCI invoice #'s 93025004, 9406038, 9506031) were eligible for reimbursement.

PROPOSED CONCLUSIONS OF LAW

The department concedes that tank pull costs totaling \$3,118.75 are eligible for reimbursement.

The appellant has the burden of proving that the PECFA program's denial of the other disputed costs was in error and that the costs were eligible for reimbursement.

The appellant has not met its burden of establishing that the remaining denied costs are eligible for reimbursement.

The state hearing officer therefore finds that the department was correct in denying reimbursement of costs of \$12,927.29 for services of T. J. Mueller & Associates on the basis that those services were unreasonable and unnecessary within the meaning of Wis. Stat. §101.143.

PROPOSED DECISION

The department's December 6, 1996 decision is affirmed in part and reversed in part. Accordingly, the department shall reimburse the appellant an additional \$3118.75 for tank pull costs, unless already paid. The department's decision to deny all other contested amounts is affirmed.

By James H. Moe
 State Hearing Officer